Supreme Court, U. S.
FILED
NOV 15 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 77-720

OCTOBER TERM, 1977

EDMUND A. ROSNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. JEFFREY WEISENFELD
Attorney for Petitioner
401 Broadway
New York, N.Y. 10013

STEVEN M. JAEGER
Of Counsel

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions and Statements Involved	2
Statement	2
Reasons for Granting the Writ	5
The Writ Should Be Granted To Resolve The Proper Interpretation Of Rule 606(b) Of The Federal Rules Of Evidence Concerning Use Of An Affidavit Of A Juror When Impeachment Of A Verdict Is Not Involved	5
The Writ Should Be Granted Under The Court's Supervisory Power To Correct The Erroneous Denial Of A Motion For A New Trial Based On The Holding In *United States v. Agurs*, 427 U.S. 97 (1976)	10
Conclusion	14
Appendices	
Order of Court of Appeals for the Second Circuit	1a
Excerpt of Transcript of Proceedings dated May 11, 1977	3a

Affidavits of Jurors 5a

Article, New York Magazine, March 28, 1977 ..... 7a

Statutes and Constitutional Provisions 23a

CASES CITED

Bettman v. United States, 224 F. 819 (6th Cir.), cert. denied, 239 U.S. 642 (1915) 9

Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976) 11

Downey v. Peyton, 451 F.2d 236 (4th Cir. 1971) 8

Hyde v. United States, 225 U.S. 347 (1912) 7

Mattox v. United States, 146 U.S. 140 (1892) 7

McDonald v. Pless, 238 U.S. 264 (1915) 7

Parker v. Gladden, 385 U.S. 363 (1966) 8

People v. DeLucia, 20 N.Y. 2d 275, 282 N.Y.S. 2d 525 (1967) 8

People v. Johnson, 79 Misc. 2d 880, 361 N.Y.S.2d 512 (Dutchess Co. Ct. 1974) 7

Searfoss v. Lehigh Valley Co., 76 F.2d 762 (2d Cir. 1935) 9

State v. Metcalf, 14 Wash. App. 232, 540 P. 2d 459 (1975) 9

Stein v. New York, 346 U.S. 156 (1953) 7

United States v. Agurs, 427 U.S. 97 (1976) 2

United States v. Aleli, 170 F.2d 18 (3d Cir. 1948) 9

United States v. Bush, 522 F.2d 641 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976) 9

United States v. Crosby, 294 F.2d 928 (2d Cir. 1961) .. 7

United States v. Freeman, 514 F.2d 1184 (10th Cir. 1975) 9

United States ex rel. Annunziato v. Manson, 425 F. Supp. 1272 (D. Conn. 1977) 11

United States ex rel. DeLucia v. McMann, 373 F.2d 759 (2d Cir. 1967) 8

United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970) 8

United States v. Green, 523 F.2d 229 (2d Cir. 1975) .. 7

United States v. Hilton, 521 F.2d 164 (2d Cir. 1975) .. 14

United States v. Howard, 506 F.2d 865 (5th Cir. 1975) 8

United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974) 9

United States v. Morrell, 524 F.2d 550 (2d Cir. 1975) . 14

United States v. Reid, 53 U.S. 361, 366 (1851) 9

STATUTES AND AUTHORITIES CITED

Rule 606(b), F.R. Evid. 2

Rule 701, F.R. Evid. 9

Note, The prosecutor's Constitutional Duty to Disclose Exculpatory Evidence in the Absence of a Focused Request from the Defense—*United States v. Agurs*, 14 Amer. Cr. L. Rev. 319 (1976) 11

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

EDMUND A. ROSNER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

Edmund A. Rosner, the petitioner herein, prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Second Circuit entered in the above entitled case on October 13, 1977.

OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed, without opinion, the denial of petitioner's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure by the Hon. Inzer B. Wyatt, U.S.D.J., on May 11, 1977. (See, Appendix, *infra*, for the order of the Court of Appeals and the oral statement of reasons by Judge Wyatt for his denial).

JURISDICTION

The judgement of the Court of Appeals for the Second Circuit was entered on October 13, 1977. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the courts below improperly interpret Rule 606(b) of the Federal Rules of Evidence concerning use of a juror's affidavit when impeachment of a verdict is not involved?

2. Did the courts below err in denying the motion for a new trial based on the holding in *United States v. Agurs*, 427 U.S. 97 (1976)?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the due process clause of the Fifth Amendment to the United States Constitution, Rule 33 of the Federal Rules of Criminal Procedure and Rule 606 of the Federal Rules of Evidence. The pertinent text of each is set forth in the Appendix, *infra*.

STATEMENT OF FACTS

On December 5, 1972, petitioner was convicted in the United States District Court for the Southern District of New York of the crimes of conspiracy, 18 U.S.C. Sec. 371, obstruction of justice, Sec. 18 U.S.C. Sec. 1503 and 2, and three counts of bribery, 18 U.S.C. Sec. 201(b) and 2 and 3227. His conviction followed a jury trial before the Hon. Arnold Bauman, U.S.D.J. After hearings on two separate motions for a new trial, petitioner was sentenced to concurrent terms of five years imprisonment. On appeal, his conviction was affirmed but the sentence was vacated and the case remanded for resentencing by another judge, 485 F. 2d 1213 (2d Cir. 1973). No mandate issued, however, pending a petition for a writ of certiorari. While that

petition was still pending, petitioner moved for a new trial based on newly discovered evidence that the government's main witness, Detective Robert Leuci, had committed flagrant and massive perjury at his trial concerning the extent of his own prior criminal misconduct. This Court denied certiorari without prejudice to the district court's consideration of the motion for a new trial, 417 U.S. 950 (1974). After a hearing, Judge Bauman denied the motion in an unreported opinion. On appeal the denial of the new trial motion was affirmed, 516 F. 2d 269 (2d Cir. 1975). Certiorari was denied on June 30, 1976, 427 U.S. 911. On August 26, 1976, Rosner filed another motion for a new trial before the Hon. Inzer B. Wyatt, U.S.D.J., based in part on the jurors affidavits and the decision in *United States v. Agurs*, 427 U.S. 97 (1976). On September 3, 1976, that motion was withdrawn by leave of Judge Wyatt, without prejudice to its renewal after this Court ruled on Rosner's then pending petition for rehearing which was based in part on the jurors affidavits which were submitted with the petition as an appendix. On October 4, 1976, this Court requested the Solicitor General to respond to the petition for rehearing, 97 S. Ct. 49. On November 29, 1976, the petition for rehearing was denied, with Justice Marshall noting his dissent, 97 S. Ct. 513.

Previously, on August 16, 1974, the Hon. Inzer B. Wyatt, U.S.D.J., who had been assigned to resentence petitioner, imposed concurrent sentences of three years imprisonment on each count. On August 26, 1976, petitioner moved for a reduction of sentence pursuant to Fed. R. Crim P. 35. This motion was denied on September 13, 1976. On September 26, 1976, petitioner filed a motion to vacate the August 16, 1974 sentence purusant to Fed. R. Crim P. 35 and 28 U.S.C. Sec. 2255 and to reassign the case for resentencing before another judge. On October 1, 1976, Judge Wyatt denied this motion. On February 1, 1977, the Court of Appeals for the Second Circuit affirmed, 549 F. 2d

259. On April 22, 1977, a petition for rehearing containing a suggestion that the action be reheard en banc was denied. A petition for a writ of certiorari was denied on October 3, 1977 (No. 76-1641).

On May 3, 1977, appellant moved for a new trial purusant to Fed. R. Crim. P. 33. This motion was denied orally on May 11, 1977, Judge Wyatt stating:

> I do not think it would serve the interests of justice to delay the determination of this matter on which my mind is fixed in order to permit me to write a long opinion. I have tried in my questions to counsel in the dialogue that we had to understand the situation thoroughly. Counsel have been very helpful.
> Therefore, I endorse the motion. I have endorsed the motion after hearing this matter in open court. The motion is denied, so ordered.

Judge Wyatt, on May 6, 1977, also denied an order to show cause seeking bail pending disposition of the new trial motion. Petitioner is presently incarcerated serving his sentence.

On May 6, 1977, petitioner moved for an order disqualifying Judge Wyatt and assigning another Judge to consider the motion for a new trial. In the course of argument on the new trial motion, the court orally denied the motion to disqualify and later filed a memorandum, dated May 12, 1977, setting forth it reasons.

On appeal, the Court of Appeals for the Second Circuit affirmed, without opinion, the denial of the motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure in an order dated October 13, 1977.

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED TO RESOLVE THE PROPER INTERPRETATION OF RULE 606 (b) OF THE FEDERAL RULES OF EVIDENCE CONCERNING USE OF AN AFFIDAVIT OF A JUROR WHEN IMPEACHMENT OF A VERDICT IS NOT INVOLVED.

In support of his motion, petitioner submitted the affidavits of Sylvia Cohen and Seymour Meisner, who were members of the jury which convicted him. (See Appendix, *infra.*) They say that if they had known about the many crimes that the Government's main witness, Detective Robert Leuci, had committed, and if they had known that he had lied about them during his trial testimony, they would not have voted to convict. Judge Wyatt refused to consider the affidavits, saying they fell within the prohibition of Rule 606(b), F. R. Evid.

Judge Bauman's denial of petitioner's previous motion for a new trial, and the Court of Appeals affirmance therein, was based on a factual finding that Leuci's perjury about his criminal activities, and the Government's suppression of evidence which the defendant specifically requested concerning Leuci's criminal past, did not affect the jury's verdict. The district court concluded that there was, in reality, no significant chance that these disclosures would have induced a reasonable doubt in the minds of enough jurors to prevent a conviction. The affidavits of the jurors, who are the most qualified witnesses on this issue, contradict the factual premise which underpins that conclusion. One juror states that "the tapes were not that important, since you could hardly hear Rosner on them." (Cohen affidavit). Moreover, the tapes do not include recordings of Leuci's first two meetings with Rosner, at

which Rosner testified he was entrapped, although earlier meetings with DeStefano and Lamattina, Rosner's codefendants, were recorded by Leuci. The tapes by themselves are inaudible in part and contain ambiguities which require Leuci's interpretation, which sharply contrasted with Rosner's and required a credibility determination by the jury. In addition, portions of the tapes support Rosner's entrapment defense. Both jurors state unequivocally that the basic issue before them was Leuci's credibility:

* * *

"Leuci's and Rosner's testimony varied concerning the events. . . and in the end I believed Leuci's version." (Cohen affidavit).

* * *

"Leuci's testimony contradicted Rosner's and ultimately I believed Leuci." (Meisner affidavit).

* * *

Both jurors also state unequivocally that if they had known of Leuci's extensive criminal career and that Leuci had perjured himself at defendant's trial, they would not have voted for petitioner's conviction:

"I know that if I had known that Leuci had lied during the trial and that he really had committed many crimes over and above the few bad things he mentioned at the trial, I would not have voted for Mr. Rosner's conviction." (Meisner affidavit).

* * *

"If I had known about all the crimes Leuci had committed and if I had known he had lied about them during his testimony I would not have voted for conviction." (Cohen affidavit).

Accordingly, there is a direct factual conflict between what the trial court assumed the jury would have done had they known of Leuci's perjury and the suppressed evidence, and what two of the jurors *have sworn* they would have done had they known of this evidence.

The juror's affidavits should have been considered on this motion and their testimony admitted at a hearing since their statements do not impeach his verdict. That rule prohibits a juror from impunging the integrity of his verdict. For example, a juror may not testify that the verdict was the result of a compromise. *Hyde v. United States*, 225 U.S. 347 (1912); *McDonald v. Pless*, 238 U.S. 264 (1915); *Stein v. New York*, 346 U.S. 156 (1953); *United States v. Green*, 523 F. 2d 229 (2d Cir. 1975). Nor may he testify that he was influenced in reaching his verdict as a result of his own misconduct, such as reading a prejudicial newspaper account of the trial during deliberations. *Mattox v. United States*, 146 U.S. 140 (1892); *United States v. Crosby*, 294 F. 2d 928 (2d Cir. 1961). But nothing contained in the jurors' affidavits impugns the integrity of the jury's deliberations and original verdict. The affidavits establish only that Judge Bauman was wrong in his factual finding, which was affirmed as supported by sufficient evidence, concerning the effect the knowledge of Leuci's criminal past and perjury would have had upon the jury's verdict.

The facts in this case are analogous to those in *People v. Johnson* 79 Misc. 2d 880, 361 N.Y.S. 2d 512 (Dutchess Co. Ct. 1974). In *Johnson*, the court considered juror's affidavits which stated that the jurors were prejudiced by the court stenographer's failure to read part of the

defendant's testimony, which omission created the erroneous impression that the defendant had made an incriminating admission. The court ruled that the jurors' affidavits were grounds for a hearing to determine whether the defendant had been prejudiced by the court stenographer's omission. Here too the jury did not hear something it should have; and here too the issue is whether the defendant was prejudiced. In neither case is the jury verdict impeached; and in this case the affidavits should have been considered, as they were in *Johnson*. Allowing the erroneous conclusion that exposure of Leuci's criminal past and flagrant perjury would not have affected the jury's verdict to remain undisturbed by these affidavits "blinks reality." See, *Parker v. Gladden*, 385 U.S. 363 (1966); *Turner v. Louisiana*, 379 U.S. 466, 473 (1965).

Even if these affidavits are treated as statements by jurors concerning the manner in which they arrived at their verdict, it is clear that the jurors would be testifying in relation to the occurrence of an outside prejudicial event, Leuci's perjury and the government's suppression, which resulted in a violation of petitioner's Fifth and Sixth Amendment rights. The jurors do not impung the integrity of the mental processes by which they reached their verdict nor do they state that the petitioner was prejudiced by any act of misconduct on their part. It is established that a juror may testify to the occurrence of an outside prejudicial event which bore upon his verdict, Fed. R. Evid. 606(b); *Parker v. Gladden*, 385 U.S. 363 (1966); *Mattox v. United States*, 146 U.S. 140 (1892); *United States v. Howard*, 506 F. 2d 865 (5th Cir. 1975); *Downey v. Peyton*, 451 F.2d 236 (4th Cir. 1971); *United States ex rel. Owen v. McMann*, 435 F.2d 813 (2d Cir. 1970); *United States ex re. DeLucia v. McMann*, 373 F.2d 759 (2d Cir. 1967); *United States v. Crosby*, 294 F. 2d 928 (2d Cir. 1961). See also *People v. DeLucia*, 20 N.Y. 2d 275, 282 N.Y.S. 2d 525 (1967); *People v. Johnson*, 79 Misc. 2d 880, 361 N.Y.S. 2d 512 (Dutchess Co. Ct. 1974).

Even assuming further, for purposes of argument, that the jurors affidavits constitute impeachment of their verdict, this type of impeachment is permissible as an exception to the general rule against a juror's impeachment of his verdict. This Court stated in *McDonald v. Pless*, 238 U.S. 264, 268-269 (1915), that "there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'", citing *Mattox v. United States*, 146 U.S. 140 (1892), and *United States v. Reid*, 53 U.S. 361, 366 (1851). In *Mattox*, the Court noted "public policy which forbids the reception of the affidavits, depositions or sworn statements of jurors to impeach their verdicts, may in the interest of justice create an exception to its own rule. . .", *Mattox v. United States*, 146 U.S. 140.

Nor can there by any doubt that the juror's statements are admissible opinion evidence under Rule 701 of the Federal Rules of Evidence and under the federal case law governing the admissibility of opinion evidence by lay witnesses. It is established that an opinion of a lay witness elicited by a hypothetical question is admissible where the assumed fact upon which the witness' opinion is based exists, although conjecture without a premise of fact is clearly inadmissible, *Searfoss v. Lehigh Valley Co.*, 76 F.2d 762 (2d Cir. 1935); *United States v. Bush*, 522 F. 2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976); *United States v. Freeman*, 514 F. 2d 1184 (10th Cir. 1975); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *United States v. Aleli*, 170 F.2d 18 (3d Cir. 1948); *Bettman v. United States*, 224 F. 819 (6th Cir.), *cert. denied*, 239 U.S. 642 (1915); see also, *State v. Metcalf*, 14 Wash. App. 232, 540 P.2d 459 (1975).

The juror's answers to the questions of what they would have done if they had known about the many crimes

that Leuci had committed and that he lied about them during his testimony, are suppositions based on known facts which are not in dispute. In federal fraud prosecutions, the testimony of witnesses, to whom the defendant allegedly made misrepresentations, as to what they would have done if they had known the true facts has been held relevant and admissible. *United States v. Bush, supra, United States v. Freeman, supra, United States v. Isaacs, supra, Bettman v. United States, supra.* Similarly, Leuci's perjury and the government's suppression of evidence relevant to Leuci's motive and credibility constituted a misrepresentation of the facts to the jury. The jurors' statements as to what they would have done if they had known the true facts should have been admitted to determine the question whether Leuci's perjury and the government's suppression prejudiced petitioner. The District Court erred in not considering the affidavits and in not holding an evidentiary hearing to establish the true facts of the situation. The Circuit Court erred by affirming this erroneous result. Petitioner requests that this Court grant a writ of certiorari to consider the proper interpretation in this case of Rule 606(b) of the Federal Rules of Evidence.

THE WRIT SHOULD BE GRANTED UNDER THE COURT'S SUPERVISORY POWER TO CORRECT THE ERRONEOUS DENIAL OF A MOTION FOR A NEW TRIAL BASED ON THE HOLDING IN *UNITED STATES v. AGURS*, 427 U.S. 97 (1976).

This Court, in *United States v. Agurs*, 427 U.S. 97 (1976), recently ruled that a prosecutor's failure to respond to a specific and relevant request for evidence helpful to the defense is seldom, if ever, excusable and that a strict standard of materiality is applied where the undisclosed

evidence creates a reason to question the veracity of any prosecution witnesses. Application of this standard clearly mandates setting aside the conviction. Indeed, a new trial is required even if the Court were to apply the applicable *Agurs* standard where no specific request for the undisclosed material was made by defense counsel; that standard requires that the omitted evidence create a reasonable doubt that did not otherwise exist. The jurors' affidavits (see Appendix) establish that such a doubt would have existed had the jury known the truth about the government's main witness. See, *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976); *United States ex rel. Annunziato v. Manson*, 425 F. Supp. 1272 (D. Conn. 1977); Note, The Prosecutor's Constitutional Duty To Disclose Exculpatory Evidence In The Absence of a Focused Request From The Defense—*United States v. Agurs*, 14 Amer. Cr. L. Rev. 319 (1976).

Subsequent to the trial of Detective Leslie Wolff, a former partner of Leuci's, in New York State Supreme Court, New York County (Sandler, J.), which trial ended on February 18, 1977 in an acquittal, an article about Detective Robert Leuci, written by the former Deputy New York City Police Commissioner in charge of public relations, Robert Daley, was published in the March 28, 1977 issue of New York Magazine. This article (see Appendix, *infra*) appears to have been prepared with the cooperation of the government since photographs of Leuci accompanied by federal or police bodyguards at secret hideaways are included in the article. The article describes Leuci's first interview over three straight days in February, 1971, with Nicholas Scopetta, then counsel to the Knapp Commission and who later as an Assistant United States Attorney, Judge Bauman found, was given the primary responsibility with Assistant United States Attorney Edward Shaw of gathering and disclosing to Rosner's defense "all 3500 material." Leuci is described as telling Scopetta

that he gave narcotics to addict informants and that he took money from "dope pusher(s)" and "killer(s)" and that his family's future rests on the fact that some dope pusher or killer "is not going to give us up."

While attempting in an emotional outburst to tell Scopetta that the Knapp Commission was wrong to concentrate on corrupt policeman when, he alleges, there are judges, prosecutors, defense attorneys, "lawyers one and all" who are "more corrupt by far than cops," Daley sets forth Leuci's outburst:

> "Do you know what it's like to be a narcotics detective? he asks Scopetta . . . Do you know what it's like on a February night in South Brooklyn, a block from the piers, with two addict informants in the back of the car, both of them crying, begging you for a bag of heroin? Do you know what it's like going home 50 miles away and getting a phone call five minutes after you're home saying, I blew the shot, please come back give me another bag? and driving back 50 miles, and watching him tie up, and walking out of the room . . .
>
> You lawyers are in Westbury or on West End Avenue, Leuci tells him (Scopetta). We're (policemen are) in El Bario, we're on 125th Street. You want us to keep everybody inside the barricades so you can stay outside. I'm on Pleasant Avenue and 116th Street at three o'clock in the morning, just me and my partner and Tony somebody that we have been following for three weeks, and he's going to offer us money, and me and my partner are going to decide whether we'll take it or not. You don't care about me. The only one who cares about me is my partner. It's me and him and this guy we caught. We're going to take his money. F—k him, f—k you, f—k them . . .
>
> I see what kind of man you are, and I see what kind of man my partner is, Leuci goes on. There's just no comparison, see? I'm going to side with him. He tells me it's okay, Bobby, we can take this money. Hey Bobby, it's you and me against the rest of the world, and we have to go home and take care of our wife and kids. We can go on vacation this year instead of waiting five years, drive a decent car. You lawyers are eating in the Copa. We try to get $40 expense money, and the department won't give us that.
>
> We're selling ourselves, our families, Leuci continues. These people we take money from own us. Our family's future rests on the fact that some dope pusher is not going to give us up, or some killer, some total piece of s—t, is not going to give us up"

It is apparent from Robert Daley's article that Leuci admitted to Scopetta as early as February 1971, in their initial talk, that he accepted bribes from dope peddlers and killers as payment for not arresting them and that he gave drugs to addict informants. Yet the only evidence of Leuci's crimes which the prosecution made available to Rosner as "3500 or Brady material" was a memorandum prepared by Scopetta of admissions Leuci made in this interview to three or four minor acts of corruption involving sales of information where Leuci acted as an intermediary, about which he testified at Rosner's trial. Although Rosner's attorneys vigorously attempted to elicit from Leuci further admissions of crimes, particularly narcotics crimes, they were totally unsuccessful. Leuci emphatically denied such involvement and insisted that the "last time" he had committed any illegal act was mid-1967 (T. Tr 353, 380, 384). As Judge Bauman noted, "Leuci maintained under persistent cross-examination that these (four sale-of-information episodes) were the only criminal acts in which he had ever participated".

Yet, as the Daley article reveals, Scopetta, who as an Assistant United States Attorney had the responsibility of gathering and disclosing to Rosner's defense "all 3500 material," had in his possession evidence of far more serious crimes committed by Leuci as early as February 1971, which was not turned over to petitioner.

If it is true that Leuci told Scopetta before trial that he (Leuci) had been extensively involved in narcotics corruption, then this places the case in an entirely new light. A new trial would be required even under the reasoning of the earlier opinions of the District Court and the Court of Appeals.

Petitioner's newly discovered evidence, at the very least, requires the holding of a further evidentiary hearing. See, *United States v. Morrell*, 524 F.2d 550 (2d Cir. 1976); *United States v. Hilton*, 521 F.2d 164 (2d Cir. 1975). Yet, the District Court denied the motion after oral argument, refusing to hold a hearing to establish the validity of appellant's claims. Rather, the court held that it was not "persuade(d)" by the argument and denied the motion. The Court of Appeals affirmed this ruling. Petitioner contends that this holding directly conflicts with this Court's holding in *Agurs*, at least to the extent of the necessity for an evidentiary hearing, and requests that the Court grant a writ of certiorari to correct this error.

CONCLUSION

FOR THE FOREGOING REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

J. JEFFREY WEISENFELD, ESQ.
Attorney for Petitioner

Appendix

ORDER OF COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of October, one thousand nine hundred and seventy-seven.

Present:

HON. J. JOSEPH SMITH
HON. ROBERT P. ANDERSON
HON. MURRAY I. GURFEIN

Circuit Judges

UNITED STATES OF AMERICA,

Appellee,

-against-

EDMUND A. ROSNER,

Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is AFFIRMED.

s/J. Joseph Smith
J. JOSEPH SMITH

s/Robert P. Anderson
ROBERT P. ANDERSON

s/Murray I. Gurfein
MURRAY I. GURFEIN

Circuit Judges

EXCERPT TRANSCRIPT OF PROCEEDINGS MAY 11, 1977

If there is not any direct evidence on the tapes to so indicate, and we do of course have Mr. Daley who says there is no ambiguity about it, that is exactly what Mr. Leuci said.

THE COURT: I must say that after listening to these very able arguments I am inclined to say that I do not think Mr. Rosner has made out a case which would justify relief under either of the sections cited, either Rule 33 or Section 2255. I am assuming in this connection that Rule 33 motion is timely made, although I have some doubt about that. Since that rule was that the motion be made two years after final judgment, I have some question about that. I prefer not to decide the motion on that ground and I do not. The 2255 motion of course can be made at any time.

I think the affidavits of the two jurors fall squarely within Rule 606B, that jurors are not able to testify to the effect of anything upon their minds as influencing his or her to consent to the verdict.

I would give effect to the able argument of Mr. Dershowitz in response to my interrogation about that but I am not persuaded. I think essentially it shows either that Leuci is a little worse than he admitted at trial, which I think makes it very like the matter that was before Judge Bauman affirmed by the Court of Appeals, or that the government was guilty of some shenanigans by not either bringing out on direct examination or making the information available to defense counsel at the trial so that they would have a further opportunity to cross examine Leuci.

The added element here is that through Scoppetta the government knew more than it conceded at the time, and therefore was guilty of misconduct and therefore the judgment of conviction should be set aside. I just don't

think I can persuade myself to accept that argument. I feel obliged to deny the motion.

I do not think it would serve the interests of justice to delay the determination of this matter on which my mind is fixed in order to permit me to write a long opinion. I have tried in my questions to counsel in the dialogue that we had to understand the situation thoroughly. Counsel have been very helpful.

Therefore, I endorse the motion. I have endorsed the motion after hearing this matter in open court. The motion is denied, so ordered.

I indicated what my disposition had been on the motion to disqualify but I think I ought to make a short statement of my reasons in respect of that matter, and I have not. I was out of town most of yesterday and the day before. I have not had an opportunity to do that. You have been told that I am not going to disqualify myself, and I have not, and I have passed on this motion, but I am going to file a short memorandum that will at least contain the essence of the reasons for that.

Is there anything else that we can do this afternoon or is that it?

MR. DERSHOWITZ: No, thank you, your Honor, again for your accommodation on my time schedule and I have to go back to the other courtroom now.

THE COURT: Mr. Clerk, the court will be in recess.

(Time noted: 3:25 p.m.)

* * * * *

AFFIDAVITS OF JURORS

STATE OF NEW YORK
COUNTY OF BRONX SS.:

SYLVIA COHEN, being duly sworn, deposes and says:

I was a juror at the trial of *United States v. Edmund Rosner* and I voted for his conviction.

I have learned that Robert Leuci lied during his testimony at that trial when he denied having committed any crimes other than the few instances in which he was involved in the sale of police information. I have been shown Judge Bauman's findings indicating that the jurors would not have changed their minds about voting for conviction even if they had known about Robert Leuci's extensive criminal past. If I had known about all the crimes Leuci had committed and if I had known he had lied about them during his testimony I would not have voted for conviction.

During the deliberations I was concerned about whether or not Leuci had entrapped Rosner into committing the crimes for which he was indicted. Leuci's and Rosner's testimony varied concerning the events regarding this matter and in the end I believed Leuci's version. The tapes were not that important since you could hardly hear Rosner on them.

Had I known the truth about Leuci's criminal past I would not have been able to believe his testimony and consequently could not have voted for conviction.

SYLVIA COHEN

Sworn to before me this 21st
day of July, 1976.
Naomi M. Werne, Notary Public

STATE OF NEW YORK
COUNTY OF WESTCHESTER ss.:

SEYMOUR MEISNER, being duly sworn, deposes and says:

I reside at 38 Byway, Hartsdale, New York. I was a juror at the trial of *United States v. Rosner* in December 1972 and I voted for conviction of the defendant.

One of Mr. Rosner's attorneys showed me Judge Bauman's opinion in which the Judge summarized the crimes which Robert Leuci had actually committed but which he had denied at Rosner's trial. I also learned that the Judge concluded in that opinion that the jury would not have changed its mind about voting for Mr. Rosner's conviction even if the jury had known about Detective Leuci's actual and complete criminal past.

I know that if I had known that Leuci had lied during the trial and that he really had committed many crimes over and above the few bad things he mentioned at the trial, I would not have voted for Mr. Rosner's conviction.

The main issue we had to decide as jurors was whether or not Leuci entrapped Rosner into purchasing the papers. Leuci's testimony contradicted Rosner's and ultimately I believed Leuci.

But if I had known the truth about Leuci's criminal past and that he had committed numerous crimes and had lied, I would not hxve believed in Leuci's testimony and I would not have voted for conviction.

SEYMOUR MEISNER

Sworn to before me this 15th
day of July, 1976.

Naomi M. Werne, Notary Public.

ARTICLE, NEW YORK MAGAZINE, MARCH 28, 1977

THE COP WHO KNEW TOO MUCH

By Robert Daley

" . . . Detective Robert Leuci, undercover agent, star witness, led prosecutors to cases involving 100 people. Now he was on trial . . . "

After testifying for two days, Detective Robert Leuci stepped down from the witness stand in a Manhattan courtroom last month, and a six-year segment of his life was over. During that harrowing time, he had served various city and federal prosecutors—first as an undercover agent compiling evidence of corruption within the criminal-justice system, and afterward as principal witness in case after case in court. Leuci, now 36, had proven to be a one-man task force, responsible either directly or indirectly for cases made against five corrupt lawyers, a corrupt bail-bond investigator, and a corrupt assistant district attorney; against seven organized-crime figures; against a corrupt police captain, three corrupt sergeants, and over 50 corrupt patrolmen and detectives. The Special Investigating Unit—Leuci's unit—of the Narcotics Division had been wiped out. Out of about 70 detectives assigned to SIU between 1968 and 1971, 52 had been indicted, among them Lvslie Wolff, Leuci's former partner, defendant in this final trial.

Leuci himself was adding up a different score. He had been forced to turn against friends and former partners. Two of them, when confronted, killed themselves with their service revolvers; two others, after arrest, suspension, indictment, after months of heavy pressure from prosecutors, had dropped dead from heart attacks. Both were 42 years old. A sergeant went insane. On the Mafia side, five of Leuci's contacts, including his cousin John

Lusterino, were murdered by hit men.

Born and raised in Queens, Leuci was the first member of his family ever to finish high school. His father was a foreman in a pipe factory; his mother worked in a sewing-machine plant. Both had contempt for the Mafia element among their relatives, and they instilled this contempt in the oldest son. October 18, 1961, the day Bobby, aged 21, was appointed to the Police Department, was the proudest in all their lives.

Leuci, five foot nine, stocky of build, with dark-brown eyes and thick, lustrous black hair, had a cherubic countenance then and was known to other cops as Babyface. He was eager, enthusiastic, and worked so hard that within three years he had been promoted into the Detective Division and assigned to Narcotics. That was where he first saw corruption. Before long, he was taking money himself.

February, 1971. Detective Second Grade Leuci, 30, sits in earnest conversation with Nicholas Scopetta, a counsel for the Knapp Commission. The Knapp Commission has nothing on Leuci. There are not even allegations against him. But there are plenty against the Narcotics Division, and Leuci, introduced to Scopetta as a detective who may know something, has agreed to this friendly chat.

Very soon, Scopetta decides that Leuci is a troubled young man.

They talk for three straight days. The subject is crooked cops, and Leuci becomes more and more agitated.

Do you know what it's like to be a narcotics detective? he asks Scoppetta. Do you have any conception? Do you know what it's like working six, seven days a week? Do you know what it's like on a February night in south Brooklyn, a block from the piers, with two addict informants in the back of the car, both of them crying, begging you for a bag of heroin? Do you know what it's like going home 50 miles away and getting a phone call five minutes after you're

home saying, I blew the shot, please come back and give me another bag? And driving back 50 miles, and watching him tie up, and walking out of the room? Then working with him the next morning and locking up some dope pusher that's just as sick as he is? It's an insanity. And going into the office and your boss says you have to make five arrests this month? You have to be one of the best, otherwise you go back to swinging a stick.

Scoppetta, listening, wonders what has provoked this outburst.

You lawyers are in Westbury or on West End Avenue, Leuci tells him. We're in El Bario, we're on 125th Street. You want us to keep everybody inside the barricades so you can stay outside. I'm on Pleasant Avenue and 116th Street at three o'clock in the morning, just me and my partner and Tony somebody that we have been following for three weeks, and he's going to offer me money, and me and my partner are going to decide whether we'll take it or not. You don't care about me. The only one who cares about me is my partner. It's me and him and this guy we caught. We're going to take him to jail and lock him up. We're going to take his money. F—k him, f—k you, f—k them.

Scoppetta listens, waiting. Is Leuci blurting out some kind of confession? Has Leuci been on the take?

I see what kind of man you are, and I see what kind of man my partner is, Leuci goes on. There's just no comparison, see? I'm going to side with him. He tells me it's okay, Bobby, we can take this money. Hey, Bobby, it's you and me against the rest of the world, and we have to go home and take care of our wife and kids. We can go on vacation this year instead of waiting five years, drive a decent car. You lawyers are eating in the Copa. We try to get $40 expense money, and the department won't give us that.

We're selling ourselves, our families, Leuci continues. These people we take money from own us. Our family's

future rests on the fact that some dope pusher is not going to give up up, or some killer, some total piece of s—t, is not going to give us up.

For three days, Scoppetta plays Leuci expertly. There are no tape recordings, no threats. He is fatherly, soft-spoken, kind. Italians stick together, he reminds Leuci. He talks about close Italian families. He touches Leuci.

Leuci confides. His younger brother, they have just discovered, is a heroin addict. My father, Leuci says, has just called me to my face a corrupt cop.

Scoppetta says gently: And you don't want to be a corrupt cop anymore.

But Leuci wants nothing to do with Scoppetta or the Knapp Commission, he says. The purpose of the Knapp Commission is to dump on cops. Meanwhile, what about the corrupt judges, prosecutors, defense attorneys—lawyers one and all? They are more corrupt by far than cops.

Scoppetta replies that the Knapp Commission is obliged to concentrate on cops. Then f—k the Knapp Commission, answers Leuci.

But at the end of three days, the two men come to an agreement. They will try to get a new office set up under the federal attorney, and Leuci, wearing a recording device, will gather evidence against prosecutors, judges, lawyers. There are one or two terrible cops he means to nail, too, none of them in the Narcotics Division. He himself has admitted to no misdeeds for which he can be prosecuted.

First Scoppetta must go to Washington and beg money for the new office. For this he needs some sort of dramatic evidence.

What would you say, asks Leuci, if I told you that with a single phone call I can buy the location of every wiretap in the city?

Scoppetta refuses to believe him.

Leuci makes the call—to a detective in the Criminal Investigation Bureau—and later Leuci meets with him

while wearing a recording device. Scoppetta, both horrified and elated, takes this awful tape to Washington and comes back with funds.

October, 1971. Leuci has worked undercover for nine months. He is one of three men moving—apparently aimlessly—along the widewalks of lower Manhattan. This is no stroll, and its purpose is not aimless. The other two men have Leuci pinioned between them. They are looking for a place to kill him and dump the body. Leuci wears a miniature transmitter behind his belt buckle and an aerial wire taped to the middle of his chest. His two federal bodyguards have long since lost contact with him.

The focus of this investigation has been—is—lawyer Edmund Rosner, a reputed case-fixer against whom no charges have ever stuck. Rosner has been trying to buy secret grand-jury testimony using Detective Nicholas Lamattina and bail-bond investigator Nicholas DeStefano as intermediaries. They offered Leuci $2,850 for the grand-jury minutes. After making secret tapes with all three men, Leuci took and vouchered the money. The prosecutors were almost ready to pounce.

However, Lamattina and DeStefano have become suspicious. Tonight's meeting was demanded on the spur of the moment, and, once Leuci appeared, any possible backup team was eluded instantly and with ease—they merely marched Leuci down a one-way street against the flow of traffic. Now they look for an alley, an abandoned building.

Leuci talks fast. Never once in all these months has he lost his cool, nor does he do so now. These are the streets of Little Italy. If he can only spy someone he knows.

And he does. There on the street corner stands Alphonse Indelicato, better known as Sonny Red, a vicious killer. Some years before, a narcotics detective had threatened to arrest Sonny Red unless bought off. Leuci had been brought into the deal by his cousin John

Lusterino, a captain in the Colombo family, and had acted as intermediary when the money changed hands. He had been paid a commission.

Now Leuci urges his captors to confer with Sonny Red across the street there. Sonny Red will vouch for him as corrupt, and therefore trustworthy.

Lamattina is armed and holds Leuci tightly, as DeStefano approaches Sonny Red. Across the street, the two men converse. Sonny Red is staring at the ground. Finally, he stares at Leuci.

Later Leuci learns the gist of their conversation.

DeStefano: We think he's a rat. We think we should kill him.

Sonny Red: If he's a rat, then you should kill him. But if you kill him, you better be sure he's a rat, because he's a friend of ours.

DeStefano recrosses the street and confers with Lamattina. They decide to let Leuci go. No hard feelings, says DeStefano.

Lawyer Rosner is convicted for bribery and obstruction of justice after trial, and his appeal is still pending. Lamattina and DeStefano plead guilty and go to prison.

How high did corruption go? Was it really possible to bribe a district attorney? A judge? To find out the prosecutors. Leuci's employers, invented even more elaborate scenarios.

A highly paid federal informant named Carlo Dandolo is brought in to pose as a major narcotics-dealer. His arrest can be easily arranged. Once in court, he is to begin bribing.

Leuci, acting on instructions, arranges for Sergeant Peter Perrazzo, whom he believes to be a corrupt cop, to arrest Dandolo. Dandolo is at the Americana Hotel. He should be good for plenty.

Instead of arresting Dandolo himself, Perrazzo farms

the case out to Detective Joe Nunziata, 39, one of Bob Leuci's closest friends. Nunziata hurries to the Americana, where he arrest Dandolo. On him he finds the planted heroin, the planted money, and the planted passport showing stamps from Beirut, Marseilles, and other such places.

Nunziata at this time works for the Joint Task Force, whose cases are processed not in state court but in federal court. So that's where Nunziata brings Dandolo. The scenario is already in ruins—wrong courthouse, wrong arresting offices—but instead of abandoning it, the prosecutors listen to Dandolo, who says: This guy is a corrupt cop. I sense it. I can make a case against him. Never mind the D.A.'s and judges. Let's get this detective.

Leuci is aghast. He knows Nunziata. He knows his friend is in terrible peril. Nunziata is an honest man and a great detective, he pleads. But the revised scenario goes forward.

Dandolo, out on bail, meets regularly with Nunziata. Nunziata is convinced that Dandolo is the biggest narcotics-dealer ever to fall into his hands. He thinks he's playing Dandolo. It's the greatest case he has ever worked on. Dandolo keeps offering a bribe. The detective keeps refusing.

Repeatedly Nunziata trys to tail Dandolo away from their meetings. He expects to be led to Dandolo's narcotics contacts. But Dandolo is cute. He shakes the tail each time. Nunziata becomes convinced that Dandolo always makes for some specific address, and in fact this is true. Dandolo's goal is a cover apartment on the East Side where the prosecutors—and an anxious Leuci—wait each time for his report.

But Dandolo has a weakness, and Nunziata sees what it is: women. So Nunziata introduces him to a certain waitress. The detective has told her: Go anywhere with him except the Americana Hotel. All I want to know is where he takes you.

Dandolo takes the waitress straight to the cover apartment and to bed. Within hours, Nunziata is in the basement there, attaching an illegal wiretap to the apartment phone. He thinks he has found Dandolo's narcotics drop; instead, he is tapping a line leased to the very federal authorities who are trying to trap him.

A final attempt to bribe Nunziata is to be made. Leuci protests again that Nunziata is honest; the scenario should be abandoned. Nevertheless, Dandolo, wearing a wire, is sent out.

Leuci goes home, where he paces the floor. He wants to phone Nunziata. Joe, Joe, you're walking into a trap. But he doesn't do it.

Dandolo, as condition of bail, is not allowed to leave the country. Meeting now with Nunziata, he begs the detective to let him fly to Marseilles for a few days of urgent business. When he comes back he will give Nunziata evidence against a major dealer—not an Italian, some black bastard. Dandolo goes into what Leuci ever after would refer to as the "Sons of Italy" routine. Italians must help each other. Finally Nunziata says: Okay, I'll let you go back for a few days.

Dandolo presses $4,000 on Nunziata. He doesn't want to take it—the tape recording is quite specific on that point. Dandolo persists. As a token of my esteem. Nunziata shrugs and pockets the money.

Nunziata then decides to check out his wiretap. He goes to the basement of the apartment house, walking right past a federal agent doing his laundry. The amazed agent watches the detective disconnect the illegal wiretap and the tape recorder attached to it. There is a confrontation. The two men hold each other at bay. Superiors flock in from all over. Nunziata is told that he is in serious trouble.

For what? he demands. For an illegal wire on one of the beggest narcotics-dealers in the world?

No, not for an illegal wiretap, Joe, he is told. But for taking $4,000.

He is allowed to go home. He is allowed several days in which to contemplate arrest, prison. Then he is summoned to a meeting of prosecutors, who call him a whore and a thief. Andy Tartaglino, number-two man in the federal drug agency, informs him that he has three choices: He can start denouncing his colleagues in SIU, he can go to jail, or he can kill himself.

The next day, Nunziata chooses the third of these options.

Leuci is told on the steps of the courthouse. His stomach goes into convulsions. He begins to vomit. When this ends, he enters a room where Scoppetta waits with federal officials. Scoppetta asks the others to leave, then says: How did we get into this, Bob?

They face each other across the rug.

Leuci says: I don't know. You did it.

Scoppetta starts to cry. Leuci starts to cry. They stand apart, facing in opposite directions, weeping.

March, 1974. Three years have passed. Leuci is no longer undercover. He has testified in trials, though never against friends or former partners. People on both sides of the law have gone to jail. Leuci's place of residence has been changed three times, and he is guarded around the clock by teams of federal marshals. Articles have been written about him. He is portrayed as a hero cop. He has admitted to minor acts of corruption himself, but so minor they were dismissed. Leuci's image was about to be changed dramatically.

In one case, an SIU detective, Carl Aguilez, has been implicated. Aguilez is brought in, stripped of his gun and shield, and threatened with prison unless he cooperates. Prosecutors attempt to frighten Aguilez into submission. For three hours they hammer at him. But Aguilez, though terrified, will not squeal. They can do to him what they like. He will not sell out his friends.

Leuci is asked to talk to him. It's possible, a

prosecutor tells Leuci, that this guy could have the same emotional reaction you had; it's possible we can get him to do the things you did.

Aguilez, Leuci knows, is another of the SIU superstars—he is a brilliant detective. He loves being a detective. He has no other life. He once seized 105 kilos of pure heroin and cocaine straight from France, the biggest New York narcotics case ever, much bigger than the French Connection. Leuci tells Aguilez what a great detective he is.

Then: Is this the way it ends, Carl? Do you want to go to jail? To West Street tonight? They're going to put you in jail. Tonight.

Why are they persecuting us? demands the anguished Aguilez.

Leuci says: I spoke with them. They told me they won't indict you. They told me they'll try to get you your pension. Just tell them everything, and they'll help you. They'll relocate you in another part of the world and you can start your life all over again.

Aguilez, desperate, asks: Can you come to West Street with me? Can you stay with me?

Leuci leaves the room to report. He's going crazy in there, he tells the prosecutors. Let me leave with him now. Give him his gun back, and his shield. Let me take him out of here as a policeman. Don't take him out of here as a prisoner. Give him time to think about doing this as a policeman.

The prosecutors agree. An amazed Aguilez gets back his gun and shield.

Leuci takes him to a restaurant on Long Island. Leuci's bodyguards sit in another part of the restaurant. The dinner is a long one. By the time it ends, Aguilez has agreed to cooperate.

The next day he begins to tell all, including much of what Bob Leuci has been holding back for three years. Aguilez is thrown immediately before the grand jury, where

he names names. The grand jury begins indicting nearly every cop who ever served in SIU.

Meanwhile, the prosecutors swarm around Leuci. You're our principal witness, they tell him. You've testified under oath. You've been cross-examir . under oath. You've admitted to only three corrupt acts, and not very serious acts either. Aguilez says three is a ridiculous number, that up until 1971 you were one of the most active guys up there. We want the truth.

At first, prosecutors attempt to cajole him. Very soon they threaten him. You've committed perjury in trials. Talk, or be indicted.

Leuci goes home for the weekend—at this time the prosecutors have his family in a house in northern Virginia.

It is all closing in on him, and a perjury charge seems the least of it. If I go in and tell them, he broods, I've got to tell the whole thing. I can't pick and choose. That means I can't protect my partners. I can't protect Mandato, Wolff, Cody. . . . I'm not going to do it.

Leuci goes for a long walk with his seven-year-old son.

He has decided to kill himself. There seems no other way out.

He takes his son home, kisses him good-bye, and gets into his car. He has decided he can't shoot himself like Nunziata. He must crash his car so his wife can collect the insurance. He drives up and down George Washington Parkway looking for an abutement to crash into. He goes past one abutment, past two more. He is driving at 70 miles an hour, then 80, 90, and a police car comes up and pulls him over.

Leuci says: I'm a New York City cop.

The other cop says: I've been watching you for the last half hour. What are you trying to do, kill yourself?

Leuci says lamely: I just had a fight with my wife.

So the two cops talk. The other cop had been in narcotics, too, but had got out quickly. Narcotics is a crazy

scene. He wants no part of it. He has read about New York. Are any of Leuci's friends in trouble?

Yes, Leuci says.

They exchange phone numbers. The other cop invites Leuci to the Redskins' games this fall. He has season tickets. I got them on the arm.

Of course, says Leuci, what else?

The next day he flies to New York. The interrogation of Leuci lasts some days. He has no new information on the selling of seized heroin. As for the famous theft of the French Connection heroin from the police property clerk's office, Leuci has already pointed the prosecutors toward one detective he believes responsible. An income-tax-evasion case will be made against him. A second case of sold heroin involves Aguilez and two others who, having seized the 105 kilos of heroin and cocaine, held back five, which they sold for around $40,000 to a narcotics-dealer. The prosecutors know about this case also. Contrary to what people think, Leuci tells them, heroin seized by SIU detectives did not normally go back onto the street; SIU detectives arrested more pushers, seized more narcotics than any other agency by far. The SIU guys were great detectives. Once in a while, they took.

The other stories Leuci recounts are all similar in tone. There are more than a dozen in all, and the same characters keep reappearing, principally Frank Mandato, Dave Cody, Leslie Wolff—and Robert Leuci.

The prosecutors take special interest in three cases from 1968 to 1970 which can perhaps be prosecuted. Leuci recounts them this way.

(1) Armed with warrants, Leuci, Mandato, Cody, Wolff, and three others raided the bar and apartment of a narcotics-dealer named Santiago Valdez. They arrested him and seized his drugs. While Leuci was searching the bar, Wolff came down and said he had found money in the apartment upstairs. There's a hell of a lot of money up

there, Wolff said, and I'm not giving it to this dope-pusher.

Wolff went back upstairs. After precisely 90 seconds, Leuci stepped out onto the sidewalk, and the money came flying out of the upstairs window in a hatbox. Leuci caught the hatbox, walking to his car, and drove off. Later the detectives split some $12,000.

(2) Leuci and his teammates obtained a warrant for the arrest of Jose Vasserman, another major narcotics-importer. Leuci and his team talked the building superintendent into shutting off Vasserman's water and electricity simultaneously. When Vasserman peered out into the hallway to see if other lights were out too, the detectives grabbed him without a struggle.

Inside the apartment was a second man they didn't know. After talking it over, they accepted $3,600 to let this man go. They then arrested Vasserman and seized and vouchered his drugs.

About two weeks later, Leuci got a telephone call from his cousin Lusterino. Mike Coco, another drug-dealer, wanted to see Leuci. Leuci and Mandato met Coco in the Holiday Inn on 57th Street, where Coco said to the detectives: I've got $20,000 to fix this case for Vasserman.

The two detectives said: There's no way this guy can beat this case.

Coco said: Take this $10,000. If the guy goes to jail, give it back to me, because I'm going to have to vouch for this money. If the guy beats the case, you get another $10,000.

Leuci and Mandato took the money and the next day talked it over with Cody and Wolff. Leuci said: Coco is vouching for this money. If Vasserman goes to jail, we're going to have to give it back.

Wolff said, according to Leuci: Let him sue me.

Vasserman was sentenced to seven years. Coco's $10,000 was not returned. Two, possibly three men came for cousin Lusterino one night in 1972 as he was leaving his

mother's house—Leuci's Aunt Rose's house—and after a brief struggle took him away. He was never seen again.

(3) The four detectives were trying to make a case against Manuel Noa, another major narcotics-mover. But Noa never moved drugs unless paid in advance. The detectives needed $9,000 front money. The Police Department did not have that kind of money. If they went to the feds for it, the feds would take over their case. So they went to an informant—a second major dealer—and borrowed the money from him. At length, Noa informed the informant that the shipment was in. The informant informed the detectives, who drove up to Noa's West 49th Street apartment armed with warrants. Inside they found drug paraphernalia and records of drug transactions, but no drugs, though they tore the apartment apart. They did find a picnic basket full of money, $40,000 or more.

The five detectives (Leuci's team plus Sergeant John Hourigan) left the apartment with about $20,000 in a paper bag. They returned the $9,000 to their informant and shared the rest, which came to about $2,000 each.

In all, Leuci admitted to pocketing some $20,000 during those years.

Mandato and then Cody, but not Wolff, are brought in and questioned. Mandato agrees to cooperate. Cody begins to cooperate, too. The decision is made to bring in Wolff. Cody asks to talk to Wolff first.

That night he meets Wolff for dinner, then goes to Donohue's bar on 72nd Street and Broadway. He drinks heavily for several hours, then drives into the park and shoots himself.

All week Leuci has been close to the breaking point himself. The next morning in the courthouse someone days to him: By the way, Cody's dead. Leuci has a tube of tranquilizers. He swallows every pill, eludes his bodyguards, and leaves the courthouse. The pills do not kill him. He is found walking dazedly through the streets of Brooklyn.

The prosecutors choose never to prosecute Leuci. They owe him something.

One prosecutor said: You could wait 50 years and never get another opportunity such as he gave us.

In all, Leuci was responsible for cases against approximately 100 defendants. The last case to come to trial was the prosecution of Leslie Wolff last month.

The case against Wolff appeared to be a strong one. The principal witness against him was Robert Leuci, now 36, still a detective second grade in good standing. He gave his testimony, and then for two days was grilled about his own past. This case—and his whole life—had come full circle, and sitting before the jury in the thirteenth-floor courtroom, he seemed to be fulfilling two roles at once—he was prosecutor and defendant both.

Wolff watched impassively from the defense table while Leuci was accused—and accused himself—of acts for which Wolff was being tried. Leuci's testimony, after so many years, was entirely professional. But his emotions were a jumble. He didn't want his former partner convicted, and yet if Wolff was acquitted, then would not the jury, in effect, be condemning Leuci in his place?

The defense brought in a number of prosecutors for whom Leslie Wolff had recently worked. All testified that Wolff was an honorable man and a superb detective. They would give Leuci no credence whatsoever.

The trial was halted while a second group of prosecutors was brought in to praise Leuci. Scoppetta, now a deputy mayor, came. Former Assistant U.S. Attorney Mike Shaw came. Whitney North Seymour came. Rudy Giuliani came. They testified about the rare, rare thing Leuci had done in coming forward of his own accord, about his decision of conscience, about his bravery, his integrity, about all those cases. Yes, he had perjured himself in two trials, but only to save his partners—to save Leslie Wolff there. Leuci was a good man, an honorable man. To Shaw,

he was even more. "Bob Leuci is one of my heroes," Shaw said.

Leuci himself seems to have been hoping for a verdict that would justify not only his testimony against Wolff, but his testimony against everyone else, too, a verdict beyond the competence of that jury, or any other.

They acquitted Leslie Wolff.

What will happen to Leuci now? Though never granted immunity, he is unlikely ever to be prosecuted. He had never been promised a continuing career in the Police Department either. Nonetheless, it seems clear he will be allowed to stay. He works out of police headquarters on investigations that do not tap his enormous skills or his special knowledge of the drug world and the Mafia world. He earns $23,055 a year, is eligible for a pension in 1981.

He lives with his wife and their children—his son is ten and his daughter, seven—in still another distant city from which he commutes to work each day. Leuci was offered a new identity, but refused it. They have a few friends who predate 1971, and new friends are hard to come by. There are those who despise Leuci for having been a corrupt cop and others who despise him for having broken the law of silence. He tends to ask each new acquaintance too soon and too often: What do you think of me?

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeoparty of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Criminal Procedure

Rule 33.

NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Federal Rules of Evidence

Rule 606. Competency of Juror as Witness

(a) At the trial.—A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment.—Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other jurors' mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what he would be precluded from testifying he received for these purposes.